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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 283

SAMUEL FURMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App.) is reported in 140 F. Supp. 781.

JURISDICTION

The judgment of the United States Court of Claims was entered on May 1, 1956. The petition for a writ of certiorari was filed on July 25, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether, on an "as is where is" contract to sell surplus cloth by the pound without warranty or representation of any kind, the Government may be held liable on the ground that the cloth contains less yardage than anticipated by the purchaser.

CONTRACT PROVISIONS INVOLVED

The contract provides, in pertinent part, as follows:

1. INSPECTION.—Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the places and times specified in the invitation. The Government will not be obliged to furnish any labor for such purpose. In no case will failure to inspect constitute grounds for a claim or for the withdrawal of a bid after opening.

2. CONDITION OF PROPERTY.—All property listed is offered for sale "as is" and "where is" and without recourse against the Government. If it is provided herein that the Government shall load, then "where is" means f. o. b. conveyance at the point specified in the Invitation. The description is based on the best available information, but the Government makes no guaranty, warranty, or representation, expressed or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected; this is not a sale by sample.

8. ADJUSTMENT FOR VARIATION IN QUANTITY OR WEIGHT.—Any variation between the quantity or weight listed for any item and the quantity or weight of such item tendered or delivered to the Purchaser will be adjusted on the basis of the unit price quoted for such item; but no adjustment for such variation will

be made where an award is made on a "price for the lot" basis.

12. VERBAL MODIFICATIONS.—Any oral statement by any representative of the Government, modifying or changing any conditions of the contract, is an expression of opinion only and confers no right upon the Purchaser.

19. Except as indicated herein all billings and deliveries will be based on gross weights.

22. The bidder agrees to accept and pay for any number of units delivered or offered for delivery by the Government up to and including twenty-five per cent (25%) more or less than the estimated quantity stated in the schedule. Provided, however, that in the event fractional or split bids are made it is agreed that the variation of twenty-five per cent (25%) shall be computed on the basis of the quantity on which the fractional or split bid was made, and not on the estimated quantity stated in the schedule. Provided, further, that (a) in the event tie bids are received, or (b) in the event more than one bidder submits a bid upon the same item and, by reason of the nature of such bids, more than one award is to be made of such item, the Government reserves the right to limit, without restrictions, the number of units awarded to any one bidder, and the bidder agrees to accept and pay for such limited number of units so awarded.

* * * * *

On the first page of the contract there is stated:

SALE OF SURPLUS PROPERTY

ALL ITEMS SOLD "AS IS" "WHERE IS"

* * * * *

Immediately above the description of the property there is stated:

ALL ITEMS TO BE SOLD "AS IS" "WHERE IS" ON GROSS WEIGHT BASIS SURPLUS PROPERTY

Below the description of the property there is stated:

CAUTION: INSPECT THE PROPERTY

STATEMENT

On June 29, 1954, the Philadelphia Quartermaster Depot sent to petitioner and others invitations for bids on certain surplus property described in the invitation (Pet. App. 1, 2). Above the description of the property, there was stated, *ALL ITEMS TO BE SOLD "AS IS" "WHERE IS" ON GROSS WEIGHT BASIS* (Pet. App. 2). The first two items described, the only ones relevant here, were as follows (Pet. App. 2):

Item No.	Description and location of property	Quantity	Unit of Measure, Gross Wt.
1	Cloth, Wool, Bunting, Scarlet, 62" (Approx. 94,318 yds.) Acquisition Cost, $174,488.30.	40,000	Lbs.
2	Cloth, Wool, Bunting, Blue, 56" (Approx. 7,957 yds.) Acquisition Cost, $13,526.90.	4,000	"

The invitation for bids (which, when signed, became the contract) provided that the bidder agreed to accept a twenty-five percent variation in the quantity bid on (*supra*, p. 3, par. 22; Pet. App. 2).

On July 19, 1954, petitioner submitted a bid of $.682 per pound on the entire quantities offered of Items Nos. 1 and 2. His bid was accepted and he was awarded a contract at a total price of $29,326

(Pet. App. 2). In early August, there was delivered to petitioner 53,623 pounds of cloth (Pet. App. 2). This quantity was within twenty-five percent, the variation allowed by the contract, of the quantities bid on by and awarded to petitioner.

Petitioner was charged for the additional weight at the bid price of $.682 per pound, and the contract was amended to include this additional charge in the amount of $7,244.89 (Pet. App. 2). Petitioner protested the additional charge, contending that, although he bid on a poundage basis, he actually calculated his bid on a yardage basis, and that on a yardage basis the cloth delivered was less than what he had estimated (Pet. App. 3). The Quartermaster Depot denied the claim, and petitioner made the additional payment.

Petitioner then filed with the General Accounting Office a claim for $10,170 based on the same contention (Pet. App. 3). This claim was denied by the General Accounting Office, and, on May 11, 1955, petitioner filed suit in the Court of Claims for $9,945.11. Upon the Government's motion for summary judgment, the Court of Claims dismissed the petition, holding that the sale was one by the pound, not by the yard, and that the contract made it entirely clear that the Government was not guaranteeing any fixed ratio of yards per pound.

ARGUMENT

Petitioner's claim for a refund is based on the contention that he should have been charged for the cloth goods received at the rate of a certain amount per yard rather than at the contract price of $.682

per pound. It is apparent that the case turns on its particular facts and presents no issue of general importance. Further, the decision of the Court of Claims is clearly correct.

Petitioner's contract was an "as is, where is" contract of the type that has been many times considered by the courts. The contract explicitly and repeatedly advised the bidder that the Government was making no warranty or representation of any kind as to the nature of the property to be sold and that petitioner should inspect the property prior to bidding (*supra*, pp. 2–4). Such contracts are often used by the Government in disposing of its vast quantities of wartime surplus because, although they ordinarily bring much lower prices than sales with the usual warranties and representations, they save the Government the time and expense that would be required to inspect or measure the property. In making such sacrifice sales—in the present case, for example, petitioner was able to buy for $36,570.89 unused property costing the Government $188,015.20 (Pet. App. 5)—the Government places all risk upon the buyer, fully warning him that prior to bidding he should inspect the property to his own satisfaction and making available facilities for inspection. It is settled beyond dispute that the buyer in such a sale can make no claim based upon the failure of the property to live up to expectations or to be suitable for any purpose. *Maguire & Co.* v. *United States*, 273 U. S. 67; *Lipshitz & Cohen* v. *United States*, 269 U. S. 90; *United States* v. *Silverton*, 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States*, 187 F. 2d 109

(C. A. 2), certiorari denied, 342 U. S. 829; *Sachs Mercantile Co.* v. *United States,* 78 C. Cls. 801; *General Textile Corp.* v. *United States,* 76 C. Cls. 442; *Yankee Export & Trading Co.* v. *United States,* 72 C. Cls. 258; *Silberstein & Son* v. *United States,* 69 C. Cls. 412; *Snyder Corp.* v. *United States,* 68 C. Cls. 667; *Shapiro & Co.* v. *United States,* 66 C. Cls. 424; *Triad Corp.* v. *United States,* 63 C. Cls. 151.

Petitioner, citing many of the above cases, recognizes that under its contract no claim may be based on the nature or quality of the goods, and therefore attempts to present his claim as one based on a "shortage in quantity" or "shortage in delivery" (Pet. 2, 10, 12), contending that he was required to pay for a larger quantity of goods than he received. However, it is plain that petitioner's complaint that the goods did not contain a certain fixed ratio of yards per pound goes to the nature and quality—not the quantity—of the goods. The contract makes it perfectly clear that the goods were sold by weight, not by yardage, and that the unit of measure was the pound (Pet. App. 2, 4). Petitioner submitted a bid, as required by the invitation, on a poundage basis; it was accepted by the Government on a poundage basis; and petitioner was charged, according to its bid and contract price, only for the number of pounds actually received. As was stated by the Court of Claims, "It would be difficult to conceive of an invitation to bid and a contract that more clearly stated the basis on which the goods were to be sold." (Pet. App. 5). Petitioner cannot now transform the sale into one by the yard so as to enable

it to present its claim as one for a "shortage in quantity."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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